



# STATE OF INDIANA

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March 7, 2012

Mr. Fernando C. Calderon  
Indiana State Prison  
One Park Row  
Michigan City, Indiana 46360

*Re: Formal Complaint 12-FC-36; Alleged Violation of the Access to Public Records Act by the Perry County Sheriff's Department*

Dear Mr. Calderon:

This advisory opinion is in response to your formal complaint alleging the Perry County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Our Office forwarded a copy of your formal complaint to the Department. As of today's date, we have yet to receive a response.

## BACKGROUND

In your formal complaint, you allege that on January 5, 2012, you submitted a written request to the Department for a copy of your booking record and a record of the property that was processed during your booking, such as clothing, jewelry, electronics, and/or monies. You provided with your request the date of your original arrest.

In response to your request, David Faulkenberg, Jail Commander, responded in writing on January 10, 2012. Mr. Faulkenberg advised that the Department is under no obligation to compile data and deliver those records to you. Your request seeks information compiled into a form that is not the proper subject of an APRA request and demands delivery of material to you, which is not authorized under the statute. As to information pursuant to I.C. § 5-14-3-5(b) that the Department is required to provide, you are welcome to appear at the jail and inspect the requested records. The APRA provides only that records be made available for inspection or copying upon receipt of fees proscribed by the agency.

## ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information."

*See* I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Department responded to your written request within the time guidelines provided by section 9 of the APRA.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy..."). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. As to your request for property that was processed by the Department when you were booked, the Department provided that in order to respond to your request, it would be required to compile all such information from individual records, which is not required under the APRA. The Department is correct in that it would not be required to review all the records that were responsive to your request and create a new record listing the various forms of property that were processed. However, should you chose to resubmit your request, the Department would be required to provide copies of all records that were responsive to your request for property that was processed when you were booked, albeit not in the summary format as you have requested here.

I.C. 5-14-3-5(b) provides that if a person is received in a jail or lock-up, the following information shall be made available for inspection and copying:

- (1) Information that identifies the person including the person's name, age, and address.
- (2) Information concerning the reason for the person being placed in the jail or lock-up, including the name of the person on who order the person is being held.

(3) The time and date that the person was received and time and date of the person's discharge or transfer.

(4) The amount of the person's bail or bond, if it has been fixed. I.C. § 5-14-3-5(b).

The Department has provided that it has the information that is sought by you and required pursuant to the statute. You are welcome to appear at the Department and inspect the information or the Department will provide copies of the records for you. The Department is not required by statute to mail, fax, or otherwise deliver documentation at taxpayer's expense.

The APRA provides that any person may inspect and copy the public records of any public agency, except as provided in the exceptions listed in section 4 of the APRA. *See* I.C. 5-14-3-3(a). A public agency may not deny or interfere with the exercise of the right stated in subsection (a). *See* I.C. 5-14-3-3(b). The public agency shall either:

(1) provide the requested copies to the person making the request; or

(2) allow the person to make copies:

(A) on the agency's equipment, or

(B) on his own equipment.

IC § 5-14-3-3(b).

Indiana law provides the following regarding copies of public records:

If:

(1) a person is entitled to a copy of a public record under this chapter;

and

(2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record; the public agency must provide at least one (1) copy of the public record to the person. However, if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 of this chapter, the person is only entitled to inspect and manually transcribe the record. A public agency may require that the payment for copying costs be made in advance.

I.C. § 5-14-3-8(e).

While Section 3(b) of the APRA indicates an agency shall either provide copies or allow access to records, Section 8(e) makes it clear an agency is to provide copies when it has reasonable access to a machine capable of reproducing the record. *See* I.C. §5-14-3-8(e) and I.C. §5-14-3-3(b). Counselor Neal addressed a similar issue and provided:

“The Auditor here asserts the word “provide” in Section 8(e) does not mean the agency must make the copies. “When

interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself.” *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. App. 1998). Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882 (Ind. App. 1991). “Provide” means to “supply or furnish,” to “afford or yield,” or “to prepare, make ready, or procure beforehand.” *New Illustrated Webster’s Dictionary of the English Language* 780 (1992). Further, “provide” as used in Section 3(b)(1) clearly means the public agency is to make a copy, as it is followed by “or” and then Section 3(b)(2), which allows the requester to make a copy. We must assume provide was used by the legislature to convey the same meaning in the two different sections. As such, I agree with previous public access counselors that Sections 3(b)(1) and 8(e) together to require a public agency to make copies of records upon request when the agency has reasonable access to a copy machine.” *Opinion of the Public Access Counselor 07-FC-223*.

The APRA permits a public agency to charge a fee for copies of public records. *See* I.C. § 5-14-3-8. Public agencies may require a person to pay the copying fee in advance. *See* I.C. § 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124*.

The APRA does not specifically require that a public agency mail records in response to a public records request. *See Opinion of the Public Access Counselor 02-FC-05; 05-FC-264; 06-FC-91*. This Office has stated that it is reasonable and *strongly encourages* public agencies to send copies of records to the requester via the U.S. Postal Service where the requester has paid for the applicable postage costs in advance; however the APRA does not specifically provide that the agency would be required to do so (emphasis added). *See Opinion of the Public Access Counselor 09-FC-13; 09-FC-221; 10-FC-59*. As such, it is my opinion that the Department did not violate by refusing to mail the records to you that were sought.

## CONCLUSION

For the foregoing reasons, it is my opinion the Department did not violate the APRA by not creating a list or new record in response to your request and when it failed to mail the records to you.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage  
Public Access Counselor

cc: Perry County Sheriff's Department